MAY 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6762

EMMETT J. STEBBINS,

Petitioner,

v.

INSURANCE COMPANY OF NORTH AMERICA, LIFE INSURANCE COMPANY OF NORTH AMERICA, INA LIFE INSURANCE COMPANY OF NEW YORK, and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMMETT J. STEBBINS,
Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Emmett J. Stebbins, respectfully prays that a writ of certiorari issue to review the orders of the United States Court of Appeals for the District of Columbia Circuit, entered herein on February 5, 28, and March 13, 1974.

OPINIONS BELOW

There was no formal opinion of the appellate court. The orders entered[1] by the appellate court – February 5, 1974:

> On consideration of petitioner's *pro se* motion for leave to file a petition for writ of mandamus in *forma pauperis*, and it appearing to the Court that no nonfrivolous issues are raised therein, it is
>
> ORDERED by the Court that petitioner's aforesaid motion is denied.

February 28, 1974:

> On consideration of petitioner's motion for *en banc* reconsideration of this Court's order of February 5, 1974, it is
>
> ORDERED by the Court that the aforesaid motion is denied.

Without hearing or oral argument, the District Court entered its MEMORANDUM OPINION AND ORDER, October 9, 1973 – (Footnotes supplied):

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[1] *Davis v. Clark* (1968), 131 U.S. App. D.C. 379, at page 380. The Court in construing Rule 24, F.R.A.P., asserted that a denial of an application to proceed in *forma pauperis* must be accompanied by a written statement particularizing the reasons for denial of the motion. No such statement was supplied by the appellate court.

This *pro se* suit for $10,000.00 alleging violations of Title VII of the Civil Rights Act[2] of 1964, is based on the refusal of defendant insurance companies to employ plaintiff and is again before the Court after a remand to another Judge of this Court.

Because of indications in the remand opinion[3] that plaintiff did not fully appreciate the consequences of various procedural steps, the Court scheduled two status conferences[4] in open court soon after the mandate came down. The court urged that plaintiff employ a lawyer but he refused. The Court also sought to determine the scope of the remaining issues[5] and the discovery that would be necessary to bring them into focus. Defendants indicated they proposed to file a motion for summary judgment[6] and with the full agreement of the

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[2] The District and appellate courts failed to decide the Petitioner's claims founded under 42 U.S.C. 1981.

[3] *Stebbins v. Insurance Company of North America, et al.*, 156 U.S. App. D.C. 326, 481 F.2d 501 (1973).

[4] July 11 & 30, 1973, District Court Record, Transcript.

[5] See, Plaintiff's Statement of Points On Appeal, filed in the District Court, October 23, 1973.

[6] See, Responsive Pleading, 37-A *Words & Phrases* 56, and Cumulative Annual Pocket Supplement; a motion for summary judgment is not a responsive pleading within the meaning of Rule 12(a)(1), and 7(a), F.R.C.P.

plaintiff the deposition taken of plaintiff in Civil Action No. 2848-69 was incorporated in the record of these proceedings. Various rulings were made on interrogatories[7] served by the parties and an Order entered dated July 31, 1973, governing further proceedings.

Plaintiff immediately engaged in a series of motions challenging the Order and rejecting positions[8] he had taken knowingly in open court. Eventually he responded partially to certain interrogatories and filed a rambling opposition[9] to defendants' motion for summary judgment. After careful review of all the papers, the Court has determined that summary judgment should be entered for defendants.

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[7] See, Plaintiff's Motion to Compel Defendants to Answer Interrogatories, filed August 10, 1970. The Courts below refused to rule thereon.

[8] *Status Conference*, July 30, 1973, before District Judge Gesell at page 26:

> THE COURT: If you have any objection to the answer you have on that, you can file that with your papers, Mr. Stebbins.
>
> MR. STEBBINS: All right, Your Honor.

[9] See, Plaintiff's Opposition to INA's Motion for a Summary Judgment, filed in the District Court, August 13, 1973. Petitioner carried the initial burden of proof as required by this Court's ruling in *McDonnell Douglas Corp. v. Percy Green*, 411 U.S. 792, at 802, 805 (May 14, 1973).

While plaintiff has never formally[10] applied for a position with defendants, the matter is treated as if a formal application for a position as an adjustor had been made. All facts sought on a job application were developed by deposition.[11] Plaintiff believes he is qualified for the position of master adjustor at a salary of $16,000.00. The record shows otherwise. Officials of defendant companies have, for good and adequate reason, concluded that plaintiff is unqualified for a position as an adjustor and there is absolutely not a scintilla of proof that this decision is in any way racially motivated. The record amply demonstrates that plaintiff has personality traits and a degree of job and financial instability which would disqualify him for any position of trust. Each of the several Judges of this Court who have considered one or more of plaintiff's many suits has reached a similar conclusion. Plaintiff has consistently failed to satisfy any of the requisite criteria for prevailing in an

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[10] At pages 333-334, 156 U.S. App. D.C. 326, *Stebbins v. I.N.A.*, the appellate court asserted that – Stebbins "readily cure the defect found by the trial court, as he did, by filing an employment application with INA and beginning another action upon denial of employment. . . . INA's refusal was likewise prompt and unequivocal."

[11] The Deposition was fraudulent. See, Footnote 7, *supra*. See, also – Plaintiff's Affidavit annexed to Opposition to INA's Motion for A Summary Judgment, filed August 13, 1973.

action of this kind. *Griggs*[12] *v. Duke Power Company*, 401 U.S. 424 (1971).

This action is but one of many suits this plaintiff has brought over the years to satisfy his almost paranoiac fixation. While he is very knowledgeable in the law, both because of formal education and extensive experience in civil rights matters over the years, he fails to respond to directions of the Court and finds his satisfaction in continuing litigation on many fronts with no apparent desire to revolve the litigation or to deal candidly with underlying realities of his situation.

Summary judgment is granted for defendants. Each party shall bear its costs.

SO ORDERED.

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia Circuit was entered February 5, 1974; and an order denying Petitioner's Motion to Reconsider En Banc was entered February 28, 1974. See, Opinions Below, *supra.* Jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254.

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[12] *Griggs* has no application to the present proceedings. Page 800, 411 U.S. 792; *McDonnell Douglas Corp. v. Percy Green.* See also, *Cox v. Babcock & Wilcox Company* (CA-4, 1972), 471 F.2d 13, at page 16. The dismissal of an individual litigant's complaint where class relief has been sought did not require dismissal of the class action.

QUESTIONS PRESENTED

1. Whether or not the filing of an independent action under Rule 60(b)(6), F.R.C.P., bottomed upon fraud and the addition of new parties (*amicus*[13] *curiae*), within ten days subsequent to the entering of an order granting respondents-defendants' motion for a summary judgment can be treated as a motion under Rule 59(a) and (b), or as a motion under 60(b), F.R.C.P.?

or

2. Whether or not respondents-defendants are not required to file an answer, or a "responsive pleading," pursuant to Rule 12(a)(1), F.R.C.P., to an independent action filed under Rule 60(b)(6), F.R.C.P., within ten days after the Mandate of the appellate court has been entered overruling respondents' motion for a summary judgment, which motion for summary judgment was directed to the Independent Action[14] prior to expiration of time within which to file respondents' answer, or responsive pleading?

or

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[13] *AMICUS CURIAE*, 4 Am. Jur.2d, Section 3: An *amicus curiae* is not a party and cannot assume the functions of a party, an attorney for a party, or even a partisan.

Shaw v. Bill (1877), 95 U.S. 10, at 14: Upon a supplemental bill in chancery, a subpoena is not required unless new parties are made. A rule upon parties already served to answer the supplemental bill is sufficient. In accord: *Great Western Tel. Co. v. Purdy* (1896), 162 U.S. 329, at 335-336; and *Smith v. Woolfolk* (1885), 115 U.S. 143, at 148.

[14] Compare: *Fraser v. Doing*, 76 U.S. App. D.C. 111, at 114 (1942), 130 F.2d 617.

3. Subsequent to reversal and remand with directions, by the appellate court, whether or not the trial court's failure to require Insurance Company of North America, *et al.*, and Equal Employment Opportunity Commission, *et al.*, pursuant to Rule 12(a)(1), Federal Rules of Civil Procedure, to file and serve their answer to the Independent Action, deprived petitioner of procedural due process of law?

or

4. Whether or not a motion to dismiss, or a motion for summary judgment, is considered a "responsive pleading"[15] within the meaning of Rule 12(a)(1) of the Federal Rules of Civil Procedure?

STATUTES INVOLVED

42 U.S.C. 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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[15] 37-A *Words & Phrases* 56, and Cumulative Annual Pocket Supplement.

42 U.S.C. 2000e-2(a):

> It shall be an unlawful employment practice for an employer –
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

RULES INVOLVED

Rule 60(b)(6), Federal Rules of Civil Procedure (Petitioner has not employed, or used the motion because new parties cannot be added by motion. The independent action was filed within ten days. Compare: *Fraser v. Doing*, 76 U.S. App. D.C. 111, 130 F.2d 617 (19__)):

> "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Section 1655, or to set aside a judgment for fraud upon the Court."

Rule 56. Summary Judgment, F.R.C.P.:

> (e) Form of Affidavit: Further Testimony; Defense Required. Supporting and opposing affidavits shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 12(a)(1), F.R.C.P.:

A defendant shall serve his answer . . . (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; . . .

Rule 7(a), Pleadings Allowed, F.R.C.P.:

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer; if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

STATEMENT OF THE CASE

I. First INA Litigation

In 1969, Petitioner-plaintiff filed a class action, Civil Action No. 2848-69, U.S.D.C., D.C., against the Insurance Company of North America and its subsidiaries, alleging or averring racially discriminatory denial of employment opportunities to himself and others similarly situated, in

proscription of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, *et seq.*; and Section 16 of the Civil Rights Act of 1870, 42 U.S.C. Section 1981. Petitioner averred that, as part of INA's (Insurance Company of North America) discriminatory practices, the company had refused to employ him or provide him with information pertaining to the positions of Claims Examiner, Adjustor, Supervisor, Technical Representative, and Manager.

On a record consisting of a fraudulent deposition of Petitioner-plaintiff taken by INA, fraudulent exhibits introduced by INA during the deposition, and fraudulent affidavits from the company's officers, INA moved for summary judgment on three separate grounds: (1) petitioner did not allege that he had ever applied for employment; (2) INA contended that the record demonstrated that petitioner was unemployable in any position of fiscal trust in the insurance industry; and (3) INA asserted that petitioner had no standing to represent a class of aggrieved persons unless petitioner had been the subject of unlawful discrimination.

The Equal Employment Opportunity Commission (EEOC) appeared at a hearing on June 17, 1970, as *amicus curiae* in support of INA's motion for summary judgment. Counsel for EEOC asserted in oral argument that, since petitioner had never applied for a position with INA, the record demonstrated no Title VII prohibition as to petitioner. The Commission (EEOC) also agreed that petitioner's fraudulent deposition showed petitioner was unqualified for employment as an insurance adjustor or in a supervisory capacity, even though EEOC had not made an independent investigation of the charge filed by petitioner with the Commission. Ultimately, Counsel for the EEOC urged the court to strike the class action claims – not because

petitioner had failed to prove discrimination against petitioner, but because petitioner was not a competent class-representative[16] as required by Rule 23(a)(4) of the Federal Rules of Civil Procedure.

At the conclusion of the June 17 hearing, the trial court orally advised petitioner that the motion for summary judgment would be granted on the grounds that petitioner had not applied for a job and was "not employable in the insurance industry." June 30, 1970, the trial court issued a memorandum[17] opinion and order delineating the facts established by INA that were not in dispute. Bottomed on these facts, the trial court concluded that the defendants-respondents had not engaged in unlawful employment practices under Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. Section[18] 2000e-2(a)(1). Petitioner-plaintiff took no appeal from this judgment; but within ten days from entry of the judgment, petitioner filed an Independent Action (Supplemental Bill) under Rule 60(b)(6), F.R.C.P., the residual clause thereof, predicated upon fraud and newly discovered evidence, Civil Action No. 2036-70, U.S.D.C., D.C.

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16 But see: *Cox v. Babcock & Wilcox Company* (CA-4, 1972), 471 F.2d 13, at page 16: Held, the dismissal of an individual litigant's complaint where class relief had been sought did not require dismissal of the class action, even though there was not a proper representative to maintain the suit.

17 *Stebbins v. Insurance Company of North America,* ___ F. Supp. ___, 3 FEP Cases #246 (U.S.D.C., D.C., 1970).

18 See, Footnote 2, *supra.*

II. Present Litigation

July 8, 1970, petitioner-plaintiff filed an Independent Action, which he characterized as – "Complaint In the Nature of A Bill of Review", against INA and its subsidiaries, the EEOC, and certain of its officials (Civil Action No. 2036-70). Petitioner averred that various improprieties had occurred in the earlier litigation, which made it legally ineffective. In addition, petitioner set forth a new claim, alleging that on June 18, 1970 – one day after the trial judge had stated from the bench that summary judgment would be granted in the first INA suit – petitioner filed a formal employment application with INA and that the company had refused to hire petitioner.

The Independent Action, or Supplemental Bill was filed to bring-in the EEOC as a party.[19] The EEOC and INA filed motions to dismiss the verified complaint on the ground of *res judicata*. The District Court dismissed the Independent Action, or Supplemental Bill, as to all defendants. On appeal, the appellate court affirmed as to EEOC, and reversed[20] and remanded as to INA. The trial court upon remand allowed INA to file a non-responsive (a motion for a summary judgment) pleading, notwithstanding the provisions of Rule 12(a)(1) of the Federal Rules of Civil Procedure – the rule provides that the defendant shall serve his answer if the court denies the motion or postpones its disposition until the trial on

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[19] See, Footnote 13, *supra.*

[20] *Stebbins v. Insurance Company of North America, et al.*, 156 U.S. App. D.C. 326, 481 F.2d 501 (C.A.D.C., 1973).

the merits, the responsive[21] pleading shall be served within 10 days after notice of the court's action; or within ten days subsequent to entry of the Mandate of the appellate court. Compare: *Charshee v. Geraghty*, 198 N.Y.S.2d 686, at 688. See also, Appeal & Error, key number 1203(3), *Time to Proceed After Mandate*. Petitioner's opposition to INA's motion clearly shows that INA has not carried its burden of proof as required by Rule 56. In fact, petitioner established the initial burden of proof as required by this court's decision in *McDonnell Douglas Corp. v. Percy Green*, 411 U.S. 792 (1973).

By operation of law, Rule 12(a)(1), F.R.C.P., the respondents were required to file an answer to the Independent Action and their failure to comply therewith entitles the petitioner to a judgment by default. Rule 55(a), F.R.C.P. Compare: *In Re Sanford Fork & Tool Company*, 160 U.S. 247 (1895). See, Footnote 13, *supra*.

REASONS FOR GRANTING THE WRIT

I

The reasons for granting the writ are the same as those stated in Stebbins' Application for a Writ of Certiorari, filed herein, April 3, 1974 – *Stebbins v. Allstate Insurance Companies, et al.*, and the *Equal Employment Opportunity Commission*, Case No. 73-1476.

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[21] 37-A *Words & Phrases* 56, and Cumulative Annual Pocket Supplement. Motions to dismiss and Motions for summary judgment are not responsive pleadings within the purview of Rules 12(a)(1), and 7(a) of the Federal Rules of Civil Procedure. See also, Footnote 6, *supra*.

II

The orders and judgments entered by the courts below are repugnant to the principles of law enunciated by this court in *McDonnell Douglas Corp. v. Percy Green*, 411 U.S. 792, at pages 802 through 807; and *Adickes v. Kress & Company*, 398 U.S. 144, at pages 153 through 161 (1970), in the following respects:

(A)

Petitioner carried the initial burden under Title VII of establishing a *prima facie* case of racial discrimination, and the appellate court so determined:[22] (i) that petitioner belongs to a racial minority; (ii) that petitioner applied and was qualified for a job for which the employer was seeking applicants; (iii) that, notwithstanding petitioner's qualifications, he was rejected;[23] and (iv) that, subsequent to his rejection, the positions remained open and the respondents continued to seek applicants therefor.

(B)

June 1, 1970, this court set forth the guidelines for the construction and application of Rule 56 – *Adickes v. Kress & Company*, 398 U.S. 144, at pages 153 through 161. This court asserted at page 157:

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[22] At page 329, 156 U.S. App. D.C. 326, *Stebbins v. I.N.A.*: "Finally, the EEOC argued that the court should strike the class action claims – not because Stebbins had failed to prove discrimination against himself – but because he was not a competent class representative as required by Rule 23(a)(4), Fed. R. Civ. P."

[23] At page 509, 481 F.2d 501, *Stebbins v. I.N.A., supra:* "INA's refusal was likewise prompt and unequivocal; . . ."

See also, Footnote 9, *supra.* The statistical evidence, and the admissions on file show or disclose a pattern of racial discrimination by respondents.

> "We think that on the basis of this record, it was error to grant summary judgment. As to the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party."

Respondents herein (INA) did not carry its burden because of its failure to shut-out, or foreclose the possibility that the deposition[24] was fraudulent.

CONCLUSION

For the foregoing reasons the application for a writ of certiorari should be granted.

Respectfully submitted,

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[24] See, Footnotes 5, 7, 9, 11, & 23, *supra.*

MEMORANDUM

FILED
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MICHAEL RODAK, JR., CLERK

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MEMORANDUM OPPOSING CERTIORARI

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MEMORANDUM OPPOSING CERTIORARI

Petitioner seeks review of an order entered February 5, 1974, by the United States Court of Appeals for the District of Columbia Circuit denying his motion for leave to file a petition for writ of mandamus in forma pauperis (Order reprinted in petition at 2). The court below found that petitioner's motion presented no non-frivolous issues. Petitioner's motion for rehearing en banc was also denied. Orders of February 28 (pet. at 2) and March 13, 1974.

The only parties to the proceeding in the Court of Appeals were the petitioner and the Honorable Gerhard

A. Gesell, District Court Judge. The latter is not named as a respondent here. The petition for certiorari erroneously names as respondents the defendants in the District Court who were not parties in the Court of Appeals because petitioner proceeded by seeking mandamus rather than by taking an appeal, and the time for appeal has now expired.

Apart from these defects, the petition for certiorari manifests on its face that this case presents no question warranting further review. The underlying facts are clearly and succinctly set forth in the opinion of the District Court, which is reprinted in the petition at 2-6.

Respectfully submitted,

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